

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MAGDALENA REYES CRUZ**

Claimant

VS.

**HAYES COMPANY, INC.**

Self-Insured Respondent

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Docket No. 1,020,753

**ORDER**

Respondent appealed the March 16, 2005, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The parties agree claimant's right shoulder was injured at work on October 20, 2004, when one or two pieces of metal fell and struck her shoulder. Respondent admits the accident arose out of and in the course of claimant's employment with respondent. Respondent also acknowledges timely notice of that accident as required by K.S.A. 44-520. Accordingly, the right shoulder injury was not contested at the February 22, 2005, preliminary hearing.

But claimant also contends that within days of the accident she developed low back and right leg pain, which allegedly worsened as she continued to work for respondent. In the March 16, 2005, preliminary hearing Order, Judge Barnes granted claimant's request for medical treatment for the low back and also awarded claimant temporary total disability benefits.

Respondent contends Judge Barnes erred. Respondent argues claimant failed to prove she injured her low back at work and that she failed to provide the company with timely notice of the low back injury. Accordingly, respondent requests this Board to deny claimant's request for workers compensation benefits for her low back.

Conversely, claimant contends the Board should affirm Judge Barnes' findings. Claimant, however, does concede that her temporary total disability benefits should commence on November 29, 2004, rather than November 24, 2004, as ordered by the Judge. Accordingly, claimant requests the Board to modify the March 16, 2005, Order to correct that slight discrepancy.

The only issues before the Board on this appeal are:

1. Did claimant injure her low back in an accident that arose out of and in the course of her employment with respondent?
2. If so, did respondent have timely notice of that accident?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

On October 20, 2004, two wrought iron trellises slipped from a co-worker's grasp and struck claimant's right shoulder. Claimant estimated the items weighed approximately 15 pounds each. Claimant immediately reported the incident to her supervisor.

Claimant sought treatment at respondent's first aid station, where she was given ice and ibuprofen before returning to her job duties. The first aid notes from that date indicate claimant had very mild bruising on her right shoulder. The next day claimant returned to the first aid station. The first aid notes from that visit indicate claimant was doing better and that she should continue with the ibuprofen. The first aid notes do not mention low back complaints until November 29, 2004.

According to claimant, approximately four or five days after the incident, she began having symptoms in her low back and down into her right leg.<sup>1</sup> But claimant also attributed those complaints to the accident.<sup>2</sup> Claimant further testified that following the accident through November 29, 2004, she constantly complained to respondent about her low back and that she requested medical treatment two or three times.

But respondent's first aid records do not substantiate claimant's allegations. Conversely, Sandy LeSage, who is both respondent's safety director and medical director, testified she was the individual who rendered the first aid treatment to claimant. According to Ms. LeSage, claimant first complained about her low back on November 29, 2004, after claimant had been off at least five days over the Thanksgiving holiday. Ms. LeSage testified claimant stated the low back pain had commenced about five days earlier but claimant, nevertheless, attributed the low back complaints to the October 20, 2004, accident.

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<sup>1</sup> P.H. Trans. at 15, 22.

<sup>2</sup> *Id.* at 13.

Claimant provided a somewhat different history of her low back symptoms to Dr. Pedro A. Murati. At her attorney's request, claimant saw Dr. Murati in late January 2005. In his January 26, 2005 report to claimant's attorney, Dr. Murati recorded the following history:

The patient states that on the date of injury, she was packing material and a co-worker was lifting metal signs off the assembly line, when he lost his grip and dropped the sign on her right shoulder. The patient states she fell to the floor as a result of the force of the blow, experiencing immediate right shoulder, neck, mid and low back pain. . . . She states she continued to work with pain and soon after that was placed in another job, where she was repetitively drilling and stooping over. . . .

Dr. Murati felt claimant had either a strain or tear in the right rotator cuff, myofascial pain syndrome in the right shoulder girdle and into the cervical and thoracic paraspinals, and low back pain secondary to radiculopathy.

At the request of respondent, in late February 2005 Dr. Paul S. Stein examined claimant. Claimant told Dr. Stein she was squatting and leaning somewhat forward on October 20, 2004, when she was struck on the right shoulder. She also told the doctor that she fell backwards, landing on her buttocks in a sitting position. Claimant also told Dr. Stein that she had both right shoulder pain and low back pain but she initially only reported the shoulder pain because that was what she was most concerned about. According to claimant, her back pain worsened four or five days after the accident.

Dr. Stein concluded the question of what caused claimant's alleged low back complaints could not be definitively answered medically but depended upon claimant's credibility. In his February 25, 2005, medical report to Mr. Torline, Dr. Stein wrote, in part:

Ms. Reyes-Cruz states that she hurt her lower back at the same time that the objects fell on her right shoulder and that the back pain became severe several days later. There is no way for me to determine the accuracy of her history. Contemporary medical records from the Hayes Company nurse show no report of back pain when the patient was seen on the day of the shoulder injury or at the followup visit. Soft tissue injuries are not always appreciated immediately but generally are noted within 24 hours. In fact, the classical history is for the patient to indicate that they awoke the next morning with stiffness and increased pain. In this case, Ms. Reyes-Cruz stated today that she had some back pain on the day of injury but [i]t did not become severe for four or five days. **The only reasonable mechanism I can think of for that temporal pattern would be a delayed disk herniation.** The presence or absence of a disk herniation on the right could be documented by an MRI scan. Even that, however, would not clearly determine its etiology. It is not clear why Ms. Reyes-Cruz did not go to the nurse about her lower back when it first became severe but waited until 11/29/04, more than a month after

the original injury. **Despite this, the question of causation in this case cannot be definitively answered medically and is dependent upon the credibility of the patient.**

Today's examination contains multiple Waddell's signs of symptom magnification. While this does not completely rule out underlying injury, it suggests a much greater pain response to injury, if any, than would be expected by the severity of such injury. Treatment in such a situation needs to be based upon objective findings, particularly radiologic findings, rather than complaints. If MRI scan is done and clearly shows a right-sided disk herniation consistent with symptomatology, a full course of treatment including epidural steroid injections and possibly surgery would be appropriate. If it does not have such findings, treatment should be limited to about a month of physical therapy and permanent work restrictions, if any, should be carefully applied. **I do not believe that the patient is consciously malingering but she is likely considerably overreacting.** (Emphasis added.)

In short, a herniated disk in claimant's low back would be consistent with her allegations that after the accident at work she initially experienced minor low back pain that significantly increased four or five days later. Unfortunately, the necessary tests and studies have not been done to determine whether claimant has sustained a disk injury. Moreover, the record compiled to date does not explain how claimant injured her low back from being struck on the shoulder.

Nonetheless, as Dr. Stein suggested, this claim hinges upon claimant's ultimate diagnosis and credibility. And contributing to the difficulty in adjudicating this claim is claimant's inability to speak English. Judge Barnes observed claimant testify and found her a credible witness. At this juncture of the claim, by the absolute barest of margins the Board finds claimant has sustained her burden of proof that she injured her low back in the October 20, 2004 accident at work. The Board also finds respondent had timely notice of the October 20, 2004, accident and timely notice of potential injuries when claimant reported the incident to respondent's first aid department. Accordingly, the preliminary hearing Order findings should be affirmed.

The Board does not have jurisdiction at this stage of the claim to determine the appropriate period of temporary total disability benefits. Accordingly, claimant's request to modify the March 16, 2005, Order and change the starting date of the temporary total disability benefits should be addressed in an agreed order submitted to Judge Barnes.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>3</sup>

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<sup>3</sup> K.S.A. 44-534a(a)(2).

**WHEREFORE**, the Board affirms the March 16, 2005, Order entered by Judge Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2005.

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BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director